

**Fair Political Practices Commission**  
**MEMORANDUM**

**To:** Chairman Randolph and Commissioners Blair, Huguenin, Leidigh, and Remy  
**From:** Brian Lau, Commission Counsel, Legal Division  
John Wallace, Assistant General Counsel  
Luisa Menchaca, General Counsel  
**Subject:** Reconsideration of Revolving Door Regulation 18746.3 (Section 87406.3)  
**Date:** January 23, 2007

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**I. EXECUTIVE SUMMARY**

At its December 2006 Commission Meeting, the Commission adopted regulation 18746.3, interpreting and applying the postgovernmental employment restrictions for local officials provided in section 87406.3<sup>1</sup> of the Political Reform Act (“Act”). However, subsequent to the Commission’s adoption of regulation 18746.3, staff has identified issues that warrant additional consideration by the Commission.<sup>2</sup>

In drafting regulation 18746.3 to mirror regulation 18746.1 (which interprets the state one-year ban in section 87406), staff has introduced language requiring that an official *permanently leave local government service* for the one-year ban to apply. However, this requirement may appear to allow an official who would otherwise be disqualified by the one-year ban to make appearances or communications so long as the official remained in or returned to local governmental service, even in representation of a private party. It is arguable whether section 87406.3 can support this interpretation and staff proposes language clarifying whether an official holding office or employment, as specified in section 87406.3, is subject to the one-year ban upon the permanent separation from local government service or upon the permanent separation from that particular office or employment specified in section 87406.3.

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<sup>1</sup> All references to sections herein are to the Government Code unless otherwise indicated.

<sup>2</sup> As a procedural matter, regulation 18746.3 was submitted to the Office of Administrative Law (“OAL”) on December 15, 2006. As submitted, the regulatory change was scheduled to take effect thirty days after the OAL filed the regulation with the Secretary of State (“SOS”). Due to the need for additional consideration, staff withdrew regulation 18746.3 from the OAL prior to OAL filing the regulation with the SOS. On January 4, 2007, OAL confirmed that the regulation had been withdrawn pursuant to staff’s request. Upon the Commission’s reconsideration, staff will resubmit regulation 18746.3, with any additional changes, to the OAL. When resubmitting the regulation, staff may elect to make the regulatory change effective upon the filing of the regulation with the SOS. Foregoing the 30-day waiting period will avoid any unnecessary delays in the implementation of the regulation.

Moreover, in mirroring regulation 18746.1, staff has introduced a requirement that local officials, subject to section 87406.3, are prohibited from communicating with their former agency *and* any other local government agencies, as specified in section 87406.3, that they held a position within the 12 months before leaving their agency. This requirement, expressly found in section 87406, is not found in the plain language of section 87406.3. Accordingly, staff believes this issue warrants additional consideration by the Commission and proposes revised language deleting the requirement.

## **II. BACKGROUND**

Regulation 18746.3 was presented to the Commission for prenotice discussion at the October 2006 Commission Meeting and adopted by the Commission at its December 2006 Commission Meeting. Generally, regulation 18746.3 interprets the one-year ban for local officials, provided in section 87406.3, prohibiting specified local officials from making appearances before or communications with their former agency, for a period of 12 months after leaving their position, if the former official:

- Was an elected official, chief administrative officer of a county, city manager, or general manager or chief administrator of a special district;
- Performs services for compensation;
- Performs services as an agent, attorney, or representative of any other person; and
- Makes an appearance or communication for the purpose of influencing legislative action, administrative action, or “any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.”

Other than the issues identified below, it is important to note that staff’s prior analysis of regulation 18746.3, as presented at the December 2006 Commission Meeting, remains unchanged. (See attached Staff Memorandum to Commission, *Adoption of Proposed Revolving Door Regulation 18746.3 (Section 87406.3)*, dated November 22, 2006.)

## **III. ISSUE/ANALYSIS**

Subdivision (a) of Section 87406.3 provides:

“A local elected official, chief administrative officer of a county, city manager, or general manager or chief administrator of a special district who held a position with a local government agency as defined in Section 82041 shall not, for a period of one year after leaving that office or employment, act as agent or attorney for, or otherwise represent, for compensation, any other person, by making any formal or informal

appearance before, or by making any oral or written communication to, that local government agency, or any committee, subcommittee, or present member of that local government agency, or any officer or employee of the local government agency, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.”

### *1. Permanently Left Local Government Service*

Currently, subdivision (b)(1) of regulation 18746.3 provides that the one-year ban applies if:

“The official has left his or her local government office or employment, which means he or she has either permanently left local government service or is on a leave of absence.”

In drafting regulation 18746.3, staff used language from regulation 18746.1 in an attempt “to alter the elements of regulation 18746.1 only to the degree necessary to address the subtle but key distinctions between the one-year ban as applied to state officials and the one-year ban as applied to local officials.” (See Staff Memorandum, November 22, 2006, *supra*.) For this reason, the language of subdivision (b)(1) was drafted to mirror regulation 18746.1(b)(1). However, by mirroring regulation 18746.1 staff has introduced language requiring that an official permanently leave *any local government service* for the one-year ban to apply.

The requirement that an official must permanently leave local government service may appear to permit an official, who would otherwise be subject to the one-year ban, to make appearances and communications with his or her former agency, so long as the official takes another local government position or returns to local government service, even if the appearance or communication is made in representation of a private party. As an example, a county supervisor accepts employment with a private lobbying firm and resigns from his county office. Six months later, he accepts a position as a city manager. Can the former county supervisor, now a city manager, lobby the county on behalf of the private firm? Since the former supervisor has not left local government service, one could argue that the former supervisor has not *permanently left local government service* and would not be subject to the one-year ban.

Section 87406.3 provides that the local ban should apply for one-year “after leaving *that* office or employment.” (Emphasis added.) This plain language appears to indicate that the one-year ban should commence upon the official leaving the particular office or employment that subjected the official to the ban’s requirements.<sup>3</sup> The plain

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<sup>3</sup> “The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent.

language of section 87406.3 provides no indication that the one-year ban would not apply when an official takes another local government position or returns to local government service. For officials taking another local government position or returning to local government service, section 87406.3(b) expressly excludes officials who are board members, officers, or employees of other public agencies, but only if the official “*is appearing or communicating on behalf of that agency.*” (Emphasis added.)

However, one could alternatively read the phrase in section 87406.3 “after leaving *that* office or employment” as meaning that the official must leave local government service for the one-year ban to apply. Under this alternative reading, an official who had retained or returned to local government service would not be prohibited by the one-year ban from representing a private party. Thus, the language may permit an official to represent private interests, so long as the official is concurrently working for a local government agency.

## 2. *Worked for or Represented in the Previous 12 Months*

Subsection (b)(6)(A) of regulation 18746.3 provides:

“Any local government agency, including any officer or employee of any committee, subcommittee, or present member of that local government agency, that the public official *worked for or represented during the 12 months before leaving his or her office or employment.* An employee loaned to a local government agency is deemed to have worked for or represented that agency.” (Emphasis added.)

The language of subsection (b)(6)(A) was drafted to mirror regulation 18746.1(b)(6)(A). However, by mirroring regulation 18746.1, staff has introduced a requirement that local officials, subject to section 87406.3, are prohibited from communicating with their former agency *and* any other local government agencies, as specified in section 87406.3, that they held a position within the 12 months before leaving their agency.

As an example, a city manager elected to the county’s board of supervisors leaves her position with the city to assume her board position. After 11 months as a county supervisor, she resigns from office and accepts employment in the private sector. Under the current language of regulation 18746.3, the former official would fall under the restrictions of the one-year ban for 12 months after leaving the county. These restrictions potentially apply to any appearance before or communication with county *and* city officers and employees. Under this example, the one-year ban in section 87406.3 would still restrict the official’s appearances before or communications with the city 23 months after the official had left office, as opposed to 12 months after leaving the city.

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(Citations Omitted.) To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. (Citation Omitted.) When the language of a statute is clear, we need go no further.” (*Nolan v. City of Anaheim* (2003) 33 Cal. 4th 335, 340.)

The requirement included in subsection (b)(6)(A) of regulation 18746.3 is expressly stated in the one-year ban applicable to state officials in section 87406. For the state one-year ban, section 87406(d)(1) provides that designated state employees, or those who should be designated, shall not make appearances or communications for the purpose of influencing certain actions or proceedings before “any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment” in representation of any other person and for compensation.

Section 87406.3, however, does not contain this express provision and provides only that specified local officials shall not make appearances or communications for the purpose of influencing certain actions or proceedings “for a period of one year after leaving *that* office or employment” (emphasis added) in representation of any other person and for compensation. The plain language of section 87406.3 appears to suggest only that the ban will run for 12 months from the date a specified official leaves any particular position.

However, as previously discussed, one could alternatively read the phrase in section 87406.3 “after leaving *that* office or employment” as meaning that the official must leave local government service for the one-year ban to apply. Under this alternative reading, the one-year ban would not commence until the official permanently left state service. For an official who held multiple offices or positions with local government agencies, the ban would not commence until the official permanently left local governmental service and it would be consistent with the state one-year ban to apply the local ban to the position the official left and any positions held in the previous 12 months.

### *3. Clarification of Subsection (b)(6)(A)*

Currently, regulation 18746.3(b)(6)(A) does not clearly specify that the ban would apply only to agencies in which the official held a position as specified in subdivision (a) of the regulation. Except for agencies within the appointive or budgetary control of an official’s agency, staff has never read section 87406.3 to apply to appearances before or communications with agencies other than those agencies in which the official held a position specified in section 87406.3. While regulation 18746.3(b)(6)(A) is already limited by subdivision (a), adding the phrase “as specified in subdivision (a) of this regulation” would clarify that the ban only applies to appearances before or communications with those agencies for which the official held a position, as specified in section 87406.3, and the agencies within the specified agencies’ appointive or budgetary control.

## **IV. STAFF RECOMMENDATION**

In terms of the proposed clarification of regulation 18746.3(b)(6)(A), staff recommends adding the phrase “as specified in subdivision (a) of this regulation” regardless of the Commission’s conclusion as to Decision Point 1.

Staff makes no recommendations pertaining to Decision Point 1. Staff's goal is simply to clarify the Commission's intent. While the language of section 87406.3 appears to indicate that the one-year ban should commence upon leaving the particular position that subjected the official to the ban, an argument can be made that an official must permanently leave local government service for the ban to apply.

Decision Point 1 will affect multiple sections of the regulation. If the Commission finds that the language is ambiguous *and* that the local one-year ban should not apply to a current officer or employee of a local government agency the commission should elect Option 1. If the Commission finds that the plain language clearly intends that the one-year ban should run upon leaving a particular office, or that the plain language is ambiguous but that the ban should indeed commence upon leaving a particular office, the Commission should elect Option 2.

*Option 1: If the Commission elects to require that an official permanently leave local government service for the one-year ban to apply, Option 1 in subdivision (b)(1), (2), and subsection (b)(6)(A) ) would be selected.*

If the Commission requires that an official permanently leave local government service, a former official working for another local government agency would not be subject to the ban so long as he or she continued to work for the local government agency. As Option 1 is currently drafted, upon leaving local government service, the official would be subject to the one-year ban commencing on the date the official permanently leaves local government service or takes a leave of absence. The ban would apply to any agency for which the official held a position, as specified in section 87406.3, in the 12 months prior to leaving local service.

For example, if a former county supervisor who had resigned to take a position as a city manager, wanted to lobby the county board of supervisors on behalf of a private party the one-year ban would not restrict the official's appearances or communications before the county because the official had not permanently left local government service. If the official then leaves the city manager position, and had been a county supervisor within the 12 months prior to leaving the city, the one-year ban would apply to appearances before or communications with the city and to appearances before and communications with the county.

*Option 2: If the Commission determines that the language of section 87406.3 refers to specific positions within local government agencies, Option 2 in subdivision (b)(1), (2), and subsection (b)(6)(A) would be selected.*

This approach would mean that the ban would commence when the official has left the county and apply to appearances before or communications, in representation of private interests, with the county even after accepting the position as a city manager. Upon leaving the city, the official would be subject to the ban for one-year for those appearances before or communications with the city.

Attachments

Proposed Amendment to Regulation 18746.3

Staff Memorandum to Commission, *Adoption of Proposed Revolving Door Regulation 18746.3 (Section 87406.3)*, dated November 22, 2006.